SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 980

ELECTRIC FURNACE CORPORATION,
Petitioner,

v.

DEERING MILLIKEN RESEARCH CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 4, 1967.

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Tennessee, Southern Division (Appendix hereto, pages 11 and 21), have not been reported. The opinions of the Court of Appeals for the Sixth Circuit are reported at 325 F.2d 761 and 383 F.2d 352, and the latest opinion is included in the Appendix at pages 26-37.

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were dated October 4, 1967, and were entered the same day (Appendix hereto, pages 38 and 40). A petition to rehear was denied November 2, 1967 (Appendix hereto, page 42). The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I.

After a Court of Appeals has held that sufficient proof was presented to support a verdict for the plaintiff on the question of liability, but that the proof of damage was insufficient and the case should be retried; after the case has been retried twice before a jury, with verdicts in favor of the plaintiff thus being entered on three separate occasions, with no errors in the charge, and with the District Judge—who observed the demeanor of the witnesses—having agreed with the jury on the question of liability and of damage; can this same Court of Appeals, under these circumstances, reverse and require the case to be dismissed with prejudice?

II.

Can a Court of Appeals weigh evidence submitted to a jury and order a case dismissed because the evidence is disputed?

III.

In a suit for libel *per quod* where the libel is directed toward the business of the plaintiff and where there is evidence of special damage, is the plaintiff denied by Tennessee law the right to introduce evidence of general damage?

IV.

Is Tennessee law applicable in a libel case in federal district court in Tennessee where the libelous letter was written in South Carolina and published in several states, but not in Tennessee, the plaintiff being a resident of Tennessee, and the confidential information used by the defendant in its libelous letter having been obtained through the processes of the Federal Court in Tennessee?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII to the United States Constitution and Rule 38(a) and 43(a) of the Federal Rules of Civil Procedure, which are relevant to the decision in this case, are set forth in the Appendix hereto at page 43.

STATEMENT OF THE CASE

On March 23, 1954, a patent was issued to Deering Milliken Research Corporation (D-M). On December 19, 1955, D-M sued Electric Furnace Corporation (E-F),

claiming a violation of their patent rights. In April, 1956, while taking the discovery deposition of Mr. Livingstone, president of E-F, D-M obtained the names of his customers who were purchasing from him the patented articles, and later wrote a libelous letter to these customers. As a result of the letter, and the subsequent loss of business suffered by E-F, this suit was filed as a counterclaim in the patent suit. D-M lost the patent suit in the District Court, appealed and lost, and the counterclaim was then tried, before a jury, on May 1, 2, and 3, 1962, and the verdict and judgment for $6,420.00 compensatory and $12,500.00 punitive damages were appealed to the Court of Appeals.

The Court of Appeals held that there was sufficient evidence to require the question of libel to go to the jury, but there was a "failure to offer any evidence to prove that Electric Furnace suffered any damages as a proximate result of the alleged libelous letter," and remanded for a new trial.

At the second trial, November 30 and December 1 and 2, 1964, a verdict and judgment for $20,000 compensatory and $50,000 punitive damages was entered. On motion of D-M the trial court, on March 16, 1965, filed an opinion denying a motion for judgment n.o.v., but granted a new trial on the "issues of compensatory and punitive damages only." Upon motion of the plaintiff to reconsider, the trial court suggested a remittitur to $839.36 compensatory and $25,000.00 punitive damages because the compensatory damages could not "exceed the proof of special damages as required by the law of Tennessee." The suggested remittitur was declined and an immediate discretionary appeal requested to determine whether or not the trial court's application of the Tennessee law was correct. This discretionary appeal was denied and the case was

retried on July 29 and 30, 1965. At this trial no proof of general damages was permitted to be presented and certain other evidence permitted in the previous trials was excluded, reducing the trial time by about one-third. The jury verdict was for $2,000.00 compensatory and $60,000.00 punitive damages, and judgment for this amount was entered August 2, 1965.

Upon motion of D-M the trial court held that the special damages proven amounted to only $834.36, and suggested a remittitur to that amount of compensatory and to $50,000.00 punitive damages. E-F elected to accept.

Upon appeal by D-M (filed January 13, 1966) and cross appeal by E-F, the Court of Appeals, on October 4, 1967, held that there was a total lack of proof that E-F lost any business because of the allegedly libelous letter, and remanded the case for entry of judgment for the defendant. A petition to rehear was denied on November 2, 1967.

REASONS FOR GRANTING THE WRIT

This case has been tried three times to a jury. No errors in the trial procedure have been shown. The Court of Appeals stated instead that "The evidence offered and admitted at the third trial gave no more support to plaintiff's case than that which made up the record at the first trial. Plaintiff-Appellee's current address to us does not contend otherwise." And later: "Our suggestion of a method of providing the 'missing link' in the proofs was not followed: no relevant testimony by any customer was provided at the third trial." And finally: "There is a total lack of proof that Electric lost any business *because* of that letter."

This is despite the facts clearly set out in the opinion of the trial judge, as follows:

"The plaintiff has further shown that at least five of its customers were influenced upon receiving the defamatory letter to write or call upon the plaintiff to explain, three of which customers make specific reference to the defamatory position of the defendant's letter, wherein the letter stated that the customer's name had been given the defendant by Mr. Livingstone and the letter was being written with his knowledge. (See Exhibits 11, 12, 13, 14, and the testimony of Stanley Livingstone and E. S. Belshear [sic].) The plaintiff has shown that it incurred expense in the sum of $25.00 in writing letters to all of its customers in an effort to explain and mitigate the effect of the defamatory letter and that it spent $814.36 upon travel expenses in calling upon 32 of its 60 customers, being the more important customers, in an effort to explain and mitigate the effect of the letter, including $331.75 in calling upon two specific customers, Levi and Pepperell, its best customers."

The District Judge then proceeded to state that:

"While there is evidence upon which a jury might find that the defamation was the proximate cause of a general loss of business to the plaintiff, the Court is of the opinion that under the special damage rule of *Fry v. McCord Bros., supra*, evidence of a general loss of profits is insufficient to base a verdict upon in an action of libel per quod. A recovery may be based only upon proof of specific losses in reference to specific customers. The rule denying consideration to proof of general damages and permitting consideration only of evidence of special damages in an action of libel per quod, while permitting consideration of general damages in an action of libel per se, appears to have its roots in history and not in reason. The rule cannot be justified on any logical basis . . . . This Court is compelled to follow the law as established by the Court of Tennessee in this regard, however."

The District Judge thereupon granted a third trial, and during this trial permitted no testimony on general damages. In an opinion on a motion n.o.v. and a motion for a new trial, the District Judge said:

"With respect to the issue of damages, the evidence upon the third trial was substantially the same as the evidence introduced at the second trial. . . While the Court is of the opinion that evidence of special damages does exist in the record, it is the further opinion of the Court that the only evidence in the record of special damages is in the total sum of $834.36 . . . two juries upon substantially the same evidence have awarded $50,000 and $60,000 respectively as punitive damages. The conduct of Dr. Armitage in writing a letter to all customers of Electric Furnace Corporation, after compelling disclosure of their names, by legal process in the patent litigation, and including within that letter a statement that their names had been furnished by Mr. Livingstone and that he, Mr. Livingstone, knew that the letter was being sent, could properly be viewed by the jury as a deliberate, malicious, and wilful attempt to destroy the confidence of the customers in the plaintiff and in Mr. Livingstone, its president. This is especially so when it appears undisputed that such language was included in the letter over the specific and strenuous objection of Mr. Livingstone and his explanation that he had promised his customers their names would not be disclosed and that they would be protected from patent litigation or harassment and that to include the objectionable language would utterly destroy the customers' confidence and good will."

The Court of Appeals completely disregards the letters written by customers, the deposition of Mr. Belcher, and points out that Mr. Livingstone's testimony regarding the exclusive nature of his trip to retrieve business lost was

shaken on cross-examination, when he indicated 'he discussed with his customers other business than that involved in the patent dispute' to a very limited extent.

This is not the function of the Court of Appeals. See *Lavender v. Kurn*, 327 U.S. 645, where this Court said:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury. (Cases cited.)
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation or conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent,

> it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Basham v. Pa. R. Co., 327 U.S. 699, and *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208, follow *Lavender v. Kurn*, as does *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, where the Court at page 359 says:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'"

See also *Stinson v. Daniel*, 414 S.W. 2d 7, at page 11, where the Court says:

> "A fact may be inferred from circumstantial evidence and such fact may be the basis of a further inference to the ultimate or sought for fact. Good v. Tennessee Coach Company, 30 Tenn. App. 575, 209 S.W. 2nd 41 (1948); Adamant Stone & Roofing Company v. Vaughn, 7 Tenn. App. 170 (1928); Nashville Gas & Heating Company v. Phillips, 17 Tenn. App. 648, 69 S.W. 2nd 914 (1934)."

The Court of Appeals in the present case, has weighed the evidence and ordered the case dismissed; and has refused to decide a legal question which the District Court said had "no logical basis."

CONCLUSION

The petition should be granted so that the Court can thoroughly consider the questions raised.

Respectfully submitted,

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December 26, 1967

Appendix